Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALTRIA GROUP, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a corporation be found to have the necessary specific intent to defraud in a RICO case without any evidence that any particular individual in the corporation had such specific intent?

PARTIES TO THE PROCEEDING BELOW

The parties in the Court of Appeals were petitioner Altria Group, Inc., Philip Morris USA Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Holdings, Inc., Lorillard Tobacco Company, British American Tobacco (Investments) Ltd., The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute, Inc., as defendants-appellants/cross-appellees; respondent United States of America, as plaintiff-appellee/cross-appellant; and Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and National African American Tobacco Prevention Network, as intervenors-appellees/cross-appellants.

RULE 29.6 STATEMENT

Altria Group, Inc. has no parent corporation and there is no publicly held corporation with a 10% or greater ownership interest in Altria Group, Inc.

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Petitioner Altria Group, Inc. ("Altria") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of liability against Altria.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 566 F.3d 1095. Pet. App. 1a-100a.[1] The orders of the Court of Appeals denying rehearing and rehearing en banc are not reported. Pet. App. 2182a-2183a, 2184a-2185a. The opinion of the district court is reported at 449 F. Supp. 2d 1. Pet. App. 101a-2181a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 2009. Petitioner's timely petition for rehearing or rehearing en banc was denied on September 22, 2009. On November 10, 2009, the Chief Justice extended all parties' time to file petitions for certiorari until February 19, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 18 U.S.C. §§ 1341, 1343, 1961, and 1962. They are reproduced in the Statutory Appendix.

STATEMENT

The RICO judgment against Altria was affirmed in the absence of any finding that any particular person

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[1] "Pet. App." citations are to the appendix filed by Philip Morris USA Inc. on behalf of all of the defendant petitioners.

caused the predicate acts of mail fraud charged against Altria with a specific intent to further any fraudulent scheme. Instead, both courts below apparently embraced the notion that Altria could be found liable under RICO pursuant to an inference based on findings that other corporate participants in the alleged RICO enterprise committed other acts with specific intent to defraud. That holding, which effectively dispensed with the need to prove specific intent as to each corporate defendant, conflicts with the holdings of other Courts of Appeals and presents an important issue that warrants this Court's review.

A. Proceeding Below

In September 1999, the government brought this action against 11 tobacco companies, holding companies, and trade associations, alleging civil violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. After a nine-month bench trial, seven defendants (including Altria) were found liable. Pet. App. 101a-2181a. The Court of Appeals affirmed the district court's judgment, with exceptions not relevant here. Pet. App. 1a-100a.

B. Altria Is Solely a Holding Company

Altria is a publicly owned holding company with less than 40 employees. Pet. App. 482a-483a n.12; C.A. App. A9145.[2] Altria does not manufacture, sell,

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[2] "C.A. App." citations are to the Joint Appendix filed in the Court of Appeals.

or distribute cigarettes or any other product. C.A. App. A9145.

Altria owns Philip Morris USA Inc. ("PM USA"), as well as other companies, but Altria does not manage PM USA's day-to-day affairs. C.A. App. A9146-47. PM USA has a separate board of directors which manages its business. C.A. App. A9146.

C. The Basis for Altria's Liability Is Four Attorney Cease-and-Desist Letters

The government alleged only nine predicate acts of mail fraud against Altria. Pet. App. 2151a-2156a, 2160a-2161a. The Court of Appeals affirmed on just four of them. Pet. App. 55a.

The four surviving predicate acts are all based upon cease-and-desist letters written by an in-house employment lawyer, Eric Taussig. Pet. App. 2152a-2154a; *see* C.A. App. A5655-56, A5664-65. The letters were sent to two former PM USA scientists, and sought compliance with PM USA confidentiality agreements. C.A. App. A5655-56, A5664-65. There is no dispute that the relevant confidentiality agreements were valid and had been violated.

D. There Is No Evidence That *Any* Officer or Employee of Altria Had Any Specific Intent to Defraud in Sending the Letters

There is no evidence that Mr. Taussig had any intent to defraud in sending the cease-and-desist letters (as opposed to an intent to enforce valid confidentiality agreements). The Court of Appeals did not dispute this. Instead, it held that "the statute looks to the intent of the individual who *caused* the mailing, not the individual who drafted or

physically mailed it." Pet. App. 56a (emphasis in original).

However, the record is equally devoid of evidence that anyone else at Altria caused the mailing with specific intent to defraud. Indeed, there is no evidence that anyone else at Altria caused the mailing. Thus, there is literally no evidence of specific intent to defraud with respect to any of the four remaining predicate acts.

E. Before and at Trial, the Government Disclaimed Any Need to Prove That Any Individual Officer or Employee Had Specific Intent

In its opening statement, the government stated that it would not attempt to show that any individual corporate representative had specific intent, but that it would rely instead on the corporation's "collective knowledge":

> Every defendant in this case is a corporate entity. As Your Honor knows, a corporate entity is not like a natural living person. A natural person's intent and knowledge, unlike a corporation, can often be determined from the words and actions of that single natural person alone. A corporation by contrast is a collective entity.
>
> Therefore, the law recognizes that a plaintiff may prove a corporation's knowledge and intent through the combined words and actions of the corporation officers, employees, agents and representatives.

> Therefore, our proof will not focus on whether, if we are looking at a particular statement which we are alleging to be falsely and knowingly made, we are not going to focus on evidence that that particular representative knew or believed the statement to be false because that's immaterial. Rather, the government's proof will rest on the collective knowledge of the defendants' corporations' officers, employees, agents and representatives. In short, our proof will rest on the totality of the evidence. C.A. App. A9043.

The government reiterated this position throughout the trial. C.A. App. A9108, A9348.

F. The Courts Below Upheld Altria's Liability Without Any Evidence That Anyone at Altria Had Specific Intent to Defraud

The district court made no specific intent findings for the four remaining predicate acts. Indeed, it made no findings of specific intent on the part of Altria at all. Instead, following the government's lead, the district court made a generalized finding of specific intent on the part of all defendants, holding that "specific intent may be established by the collective knowledge of each defendant and of the enterprise as a whole." Pet. App. 1979a.

The Court of Appeals acknowledged that, to determine corporate intent, "we look to the state of mind of the individual corporate officers and employees who made, ordered, or approved the statement." Pet. App. 33a. It also stated that it was "dubious of the legal soundness of the 'collective

intent' theory." Pet. App. 41a. However, it nonetheless upheld the district court's finding of specific intent, saying:

> Specific intent to defraud may be inferred where, as here, there is a pattern of corporate research revealing a particular proposition, for example, that smoking is addictive; an ensuing pattern of memoranda within the corporation acknowledging that smoking is addictive, even though the memoranda may or may not have gone directly to the executive who makes the contrary statement; and the corporate CEO or other official of high corporate status then makes a public statement stating that smoking is not addictive, contrary to the knowledge within the corporation. Pet. App. 40a.

Neither the district court nor the Court of Appeals made any finding that *anyone* at Altria (Mr. Taussig or anyone else) had any specific intent to defraud, or knew that the letters he sent were part of any fraud. Thus, the judgment against Altria cannot be sustained on any theory of intent inferred from "collective knowledge" at Altria – whether that theory is articulated as the government formulated it at trial, or as the Court of Appeals reformulated it on appeal.[3]

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[3] The decision below also cannot be sustained on any theory of piercing the corporate veil between Altria and PM USA, because both the government and the district court expressly disavowed such a theory. Pet. App. 1943a n.58.

Instead, the Court of Appeals appears to have concluded that Altria's liability could be predicated on the inferred specific intent of *other* corporate defendants. Mr. Taussig's lack of fraudulent intent did not preclude liability, the Court of Appeals said, "[g]iven that the district court permissibly inferred the corporate *Defendants'* intent from the intent of numerous high-level executives," and "given that it found that *Defendants* 'caused' the mailings in order to further the scheme to defraud." Pet. App. 57a (emphasis added).

The Court of Appeals affirmed the district court's finding that Altria conspired to violate RICO based upon "the circumstantial inference that Altria conspired with the other Defendants to violate RICO." Pet. App. 57a. Missing, here again, was any evidence that anyone at Altria had the specific intent to defraud necessary to sustain this claim. *See, e.g., United States v. Dale*, 991 F.2d 819, 851 (D.C. Cir. 1993).

REASONS FOR GRANTING THE PETITION

By finding that Altria had specific intent to defraud, without evidence that any officer or employee of Altria had any such intent, the courts below have raised important issues which should be reviewed by this Court.

In the first place, by holding that specific intent may be inferred from an aggregation of the knowledge and beliefs of other employees of the corporation, the courts below have placed themselves in conflict with other circuits. These circuits have held that the required state of mind must exist in the particular individual directing or carrying out the

wrongful conduct, and cannot be imputed based on the knowledge or beliefs of others. *See, e.g.*, *Southland Sec. Corp. v. INSpire Solutions Inc.*, 365 F.3d 353, 366 (5th Cir. 2004); *Dana Corp. v. Blue Cross & Blue Shield Mut.*, 900 F.2d 882, 886 n.2 (6th Cir. 1990); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435-36 (9th Cir. 1995); *Woodmont, Inc. v. Daniels*, 274 F.2d 132, 137 (10th Cir. 1959). This conflict among circuits calls for review and correction by this Court.

However, even if this Court were to uphold a "collective knowledge" approach to corporate specific intent, that would not suffice to impose liability upon Altria in this case. As to Altria, the government simply failed to present even "collective knowledge" evidence. Accordingly, as to Altria, there was a failure of proof even under the theory of specific intent espoused by the government at trial.

To affirm Altria's liability, the Court of Appeals therefore appears to have fallen back upon the inferred specific intent of other defendants, saying that a finding of fraudulent intent in mailing the Taussig letters was appropriate "[g]iven that the district court permissibly inferred the corporate *Defendants'* intent from the intent of numerous high-level executives," and "given that it found that *Defendants* 'caused' the mailings in order to further the scheme to defraud." Pet. App. at 57a (emphasis added).

This, however, violated the fundamental principle that "knowledge [and] intent . . . must be proven, not assumed, with respect to each defendant." *Boim v. Holy Land Found. for Relief and Dev.*, 511 F.3d 707,

756 (7th Cir. 2007). This principle has been consistently applied in the RICO context. Courts have repeatedly held, for example, that criminal guilt under RICO must be proven "on the basis of [the defendant's] own proven conduct, association is not enough." *United States v. To*, 144 F.3d 737, 746 (11th Cir. 1998); *accord, e.g.*, *United States v. Elliott*, 571 F.2d 880, 906 (5th Cir. 1978). *Cf. Kotteakos v. United States*, 328 U.S. 750, 776 (1946) (in conspiracy cases, "extraordinary precaution is required, not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass"). The Court should grant certiorari in order to make clear that guilt by association is not an acceptable standard of specific intent.

Unless reviewed by this Court, the holding below will dramatically expand the scope of the RICO statute where, as here, the government brings a far-reaching RICO case based upon allegations of mail fraud and wire fraud. Such predictability and notice as the mail fraud and wire fraud statutes afford are importantly bound up with the requirement that the government prove that each defendant had the specific intent to defraud. By watering down this requirement to the point of nonexistence in the case of corporations, the court below eliminated an important safeguard against the misuse of these sweeping statutes.

CONCLUSION

The petition of Altria Group, Inc. for a writ of certiorari should be granted. In the alternative, the judgment of the Court of Appeals should be vacated as to Altria Group, Inc., on the ground that no tenable approach to corporate specific intent can impose liability upon Altria Group, Inc., when no one at Altria Group, Inc. had such intent.

Dated: February 18, 2010

Respectfully submitted,

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STATUTORY APPENDIX

18 U.S.C. § 1341 (Supp. I 2006). Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be

fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 (Supp. I 2006). Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1961 (2006). Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one

year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections

1581–1592 (relating to peonage, slavery, and trafficking in persons).,[1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to

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[1] So in original.

white slave traffic), sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501 (c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b (g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt

(A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and

(B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962 (2006). Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any

enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.